No. 90-1335

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

KENNETH P. NOLAN AND VERNON T. JUDKINS,

Petitioners,

—v.—

THE BOEING COMPANY, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I.

Does this case present any issue appropriate for Supreme Court resolution when (a) the Court of Appeals' decision does not conflict with any holding of this Court or any other Court of Appeals, (b) statutory changes during the pendency of this case give it a unique factual and procedural posture unlikely to reoccur, and (c) further statutory changes substantially redefine for future cases the issues resolved by Court of Appeals?

II.

Does the removal provision of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1441(d), permit a third-party foreign state defendant to remove an entire civil action where there is at least minimal diversity between the parties to the other claims?

III.

Should this Court alter the well-established and uniformly applied rule that a party entitled to remove an action on the basis of that party's identity or status removes an entire civil action when the party is sued as a third-party defendant?

LIST OF PARTIES

Those parties not listed in the caption herein include the following:

A. Defendants

1) General Electric Company ("GE")
2) CFM International, Inc. ("CFMI, Inc.")

B. Third-Party Defendants

1) Societe Nationale d'Etude et de Construction de Moteurs d'Aviation, S.A. ("SNECMA")

RULE 29.1 LISTING OF AFFILIATED CORPORATIONS

A. General Electric Company

The General Electric Company has a number of subsidiaries in the United States and elsewhere. There are, however, only a limited number of these subsidiaries that have any outstanding equity or debt securities that are publicly held. These are:

Dart & Kraft Financial Corporation
GECC Financial Corporation
General Electric Capital Corporation (formerly General Electric Credit Corporation)
General Electric Capital Canada, Inc.
General Electric Credit International, N.V.
General Electric Financial Services, Inc.
General Electric Overseas Capital Corporation
Montgomery Ward Credit Corporation

The public holdings of Dart & Kraft Financial Corporation, GECC Financial Corporation, General Electric Capital Corporation, General Electric Capital Canada, Inc., General Electric Credit International, N.V., General Electric Financial Services, Inc., General Electric Overseas Capital Corporation, and Montgomery Ward Credit Corporation are limited to debt securities.

General Electric Company itself has common stock and debt securities that are publicly traded.

In addition, General Electric Company owns 50% of Montgomery Ward & Co., Incorporated, which has publicly held debt securities and 51% of CAMCO, Inc. (Canada), which has publicly held equity securities.

B. CFM International, Inc.

There are no parent companies, subsidiaries, or affiliates to list for this party.

C. Societe Nationale d'Etude et de Construction de Moteurs d'Aviation, S.A. (SNECMA)

SNECMA has several subsidiaries and affiliates. They are:

Compagnie Generale des Turbomachines, S.A. (CGTM)
Corse Composites Aeronautiques, S.A.
Famer, S.A.
Fabrications Mecaniques de l'Atlantique, S.A. (FAMAT)
FN Moteurs
Hispano-Suiza, S.A.
Messier-Bugatti, S.A.
Office d'Exportation de Materiels Aeronautiques, S.A. (OFEMA)
Sochata, S.A.
Societe Europeenne de Propulsion, S.A. (SEP)
Societe Europeenne d'Analyse et Programmation, S.A. (SEDAP)
Societe de Reparation et d'Entretien de Compresseurs Speciaux, S.A. (SORECOS)
Societe d'Exploitation des Materiels Martin Baker, S.A. (SEMMB)
Vallaroche
Vallaroche Investissements

D. The Boeing Company

There are no parent companies, subsidiaries, or affiliates to list for this party.

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OPINIONS BELOW

The Petition seeks the issuance of a Writ of Certiorari to review the order and judgment of the United States Court of Appeals for the Fifth Circuit, *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir. 1990) (pages 1-27 of the Appendix to the Petition), that unanimously affirmed orders of the United States District Court for the Eastern District of Louisiana denying Petitioners' motion to remand (App. 28-33) and granting Respondents' motion to dismiss on the ground of *forum non conveniens*. Petitioners challenge only the remand decision; their Petition does not present to this Court any questions

concerning the propriety of the dismissal of their claims on the ground of *forum non conveniens*.

COUNTERSTATEMENT OF THE CASE

These sixteen consolidated civil actions arise out of the January 8, 1989 crash of a Boeing 737-400 aircraft operated by British Midland Airways, Ltd. ("BMA"), a regional airline operating principally within the United Kingdom. The crash occurred while the aircraft was on a scheduled flight from London, England, to Belfast, Northern Ireland. The claimants in these actions, all of whom are citizens of foreign countries (mostly the U.K.) and reside outside the United States, are injured passengers, crew, bystanders, and the surviving relations of forty-six persons killed in the accident. Petitioners brought suit in Louisiana state court against Boeing, the manufacturer of the aircraft, GE, one of the two engine manufacturers, and CFMI, Inc., a corporation jointly-owned by GE and SNECMA, the other engine manufacturer. None of the events giving rise to the accident occurred in Louisiana; Louisiana's sole contact with this matter is that Boeing and GE have unrelated business activities there that subject them to the general jurisdiction of the Louisiana courts.

These cases present unusual facts in a unique procedural context. Although Petitioners claim in this Court that they originally chose to file this lawsuit in Louisiana because "they could obtain jurisdiction over all the primary defendants" (Pet. 14), it is obvious that economy of litigation was not Petitioners' motivation. Petitioners failed to bring suit against the most significant potential defendant: BMA.[1] Indeed, the Air Accidents Investigation Branch ("AAIB") of the U.K. Department of Transport, which investigated the accident, concluded that the cause of the accident was incorrect action on the part of the BMA crew. Petitioners presum-

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1 Respondents are informed and believe that, after the Court of Appeals' decision, claimants sued BMA in England.

ably did not name BMA as a defendant in these actions because BMA does no business in Louisiana and the Louisiana courts could not obtain jurisdiction over BMA.

Petitioners also failed to sue SNECMA, an equal participant with GE in the design and manufacture of the accident aircraft's engines. Indeed, after Boeing added SNECMA, Petitioners objected that SNECMA was *not* subject to the jurisdiction of the Louisiana courts for claims arising out of this accident—a contention they repeat in their Petition.[2] (Pet. 3)

Petitioners' real motivation for filing these actions in Louisiana was their hope that the Louisiana state courts would not apply the doctrine of *forum non conveniens* to dismiss the actions for refiling in the United Kingdom. Thus, claimants tried to structure the cases so that the federal courts would lack diversity jurisdiction even though all claimants were foreign and all the defendants were United States corporations. In order to accomplish this goal, nominal plaintiffs Kenneth P. Nolan and Vernon T. Judkins were appointed representatives of the 255 foreign claimants in these actions. Messrs. Nolan and Judkins had no contact with the claimants they represented and, as Petitioners have admitted, were retained by claimants' U.S. counsel to lend their names to these actions for the sole purpose of defeating diversity jurisdiction.[3]

The appointment of Nolan and Judkins to their various representative capacities was a necessary but not sufficient

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2 As Boeing advised the District Court, Petitioners' argument was and is without merit. Boeing pointed out that the FSIA provides for nationwide personal jurisdiction over a non-immune "foreign state." *See* 28 U.S.C. § 1330(b) (1988); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 313 (2d Cir. 1982), *cert. denied*, 454 U.S. 1148 (1982).

3 Judkins is a citizen of Washington, and Nolan is a citizen of New York. Boeing is a Delaware corporation with its principal place of business in the State of Washington, and GE is incorporated and has its principal place of business in New York. Accordingly, should Nolan's and Judkins' citizenship control, complete diversity between plaintiffs and defendants would be absent.

element of Petitioners' strategy. As soon as the appointments were made (and in some cases even before), Petitioners filed these actions in Louisiana state court and served the complaints on defendants so that defendants' statutory 30-day removal period would expire prior to May 18, 1989, the effective date of § 202(a) of the Judicial Improvements and Access to Justice Act, Pub. L. 100-702, 102 Stat. 4642, 4646 (1988). This statute, which applied to actions removed on or after May 18, 1989, amended 28 U.S.C. § 1332(c) to clarify that the citizenship of a represented party, not the citizenship of his or her representative, determines whether diversity exists. Under this new law, there would unquestionably be federal diversity jurisdiction over Petitioners' claims against Boeing, GE, and CFMI, Inc. The prior law was unclear, however, because this Court had held 50 years ago that in some cases the citizenship of the representative, rather than the represented party, controls. *See Mecom v. Fitzsimmons Drilling Co.*, 284 U.S. 183 (1931).

Defendants timely removed these actions on May 11, 1989, which was of necessity prior to the effective date of § 202(a) of the new Act, on the basis that the citizenships of Nolan and Judkins were not controlling. Respondents argued that, even before this section became effective, the *Mecom* decision was inapplicable to this situation in view of this Court's later decision in *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823 (1969). The District Court disagreed, however, and held that in actions removed prior to May 18, 1989, the citizenship of nominal parties controls. Consequently, the District Court remanded the actions. The District Court also held that § 202(a) did not trigger a new 30-day removal period. Thus, the posture of the case after remand was that complete diversity existed between plaintiffs and defendants but the case could not be removed by defendants because the law accomplishing that result became effective after the period to remove had expired.

After the remand, Boeing moved in each action to add SNECMA as a third-party defendant.[4] These motions were granted without opposition, and SNECMA was served on August 10, 1989.[5] On August 17, 1989, SNECMA removed each of the sixteen civil actions to federal court. In its removal notices SNECMA stated that, as a French corporation almost entirely owned by the French government, it qualified as a "foreign state" under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.* (1988). The FSIA authorizes a foreign state to remove to federal court "any civil action" brought against it in state court. 28 U.S.C. § 1441(d) (1988).

Petitioners' motion to have their claims against Boeing, GE, and CFMI, Inc. remanded to state court was denied on September 23, 1989. The District Court held that, because

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4 Boeing's third-party complaint set forth a prototypical claim by a defendant in a product liability case for contribution or common law indemnity against a component supplier whose product was alleged *by plaintiffs* to have caused the accident. Boeing alleged SNECMA's role in the design and manufacture of the engines, pointed out that "plaintiffs allege that the crash resulted from the failure of one of the aircraft's CFM-56-3C-1 engines," and asserted that "[t]o the extent plaintiffs' damages, if any, were proximately caused by a failure of one of the accident aircraft's engines," Boeing was entitled to indemnity or, at the least, contribution.

Notwithstanding these facts, Petitioners profess confusion about the basis for Boeing's claim (Pet. 6 n.1, 13) and argue that Boeing's third-party complaint "had little, if any, connection to the main action." (Pet. 6)

5 On August 15, 1989, Petitioners, without giving notice to Respondents, moved *ex parte* to "sever" the third-party claims pursuant to Article 1038 of the Louisiana Code of Civil Procedure, which provides for the separate trial of claims for the purpose of avoiding delay or for the convenience of the parties or the court. Although the state court judge signed Petitioners' *ex parte* order, each of the main and third-party claims continued to be combined in one suit under one cause number and continued to constitute a single "civil action." The District Court found that the state court's *ex parte* separate trials order was irrelevant to the removal issue (App. 32), and the Court of Appeals agreed. (App. 18-19) Those rulings are not challenged in this Petition.

SNECMA had properly removed the entirety of these civil actions, no portion of them should be remanded. Boeing then moved to dismiss these actions under the doctrine of *forum non conveniens*. On October 18, 1989, the District Court granted Boeing's motion to dismiss, subject to certain conditions. *Nolan v. Boeing Co.*, 22 Avi. Cas. (CCH) 17,811 (E.D. La. 1989).

Petitioners appealed the order denying remand and the order of dismissal to the United States Court of Appeals for the Fifth Circuit, which affirmed.

REASONS FOR DENYING THE WRIT

I. The decision of the Court of Appeals in this case does not conflict with any decision of another United States Court of Appeals.

Petitioners' lead argument, contained in Point I of their Petition, is completely misleading. Contrary to Petitioners' assertion, there is no conflict between the Fifth Circuit's decision in this case and a "similar decision of the Seventh Circuit . . . ." (Pet. 5) In fact, neither the Seventh Circuit decision nor any other case cited by Petitioners in Point I even addressed the issues decided in this case. Therefore, Petitioners' suggestion that the cases are "hopelessly divided" (Pet. 5) and their argument that this Court should accept review to resolve "confusion" (Pet. 7) among the Circuits regarding the ability of a third-party defendant to remove a civil action are without merit.

Petitioners' argument misconceives the issues involved in this case and relies on wholly inapplicable cases. The cases cited by Petitioners discuss only whether: (1) a third-party defendant qualifies as a "defendant" under 28 U.S.C. § 1441(a); or (2) a third-party claim can be "separate and independent" from plaintiffs' claims against the original defendants and thereby form the basis for removal of the entire civil action pursuant to 28 U.S.C. § 1441(c). Even if there is some disagreement about these issues among courts,

these issues are not present in this case, which in no way involves either of subsections 1441(a) or 1441(c).

In this case, the Fifth Circuit addressed the scope of removal under the FSIA, 28 U.S.C. § 1441(d). The Fifth Circuit held that "when a third party [foreign state] defendant avails itself of removal jurisdiction under section 1441(d), at least where minimal diversity exists between the parties to the main claims, it removes not just the third party claims but the main claims as well".[6] (App. 17-18) No Court of Appeals, other than the Fifth Circuit in this case, has addressed the application of 28 U.S.C. § 1441(d) to a third-party defendant. However, numerous analogous statutes, *e.g.*, 28 U.S.C. § 1442(a) (1988), 28 U.S.C. § 2679(c) (1988), and 12 U.S.C. § 1819 (1988), allow a party to remove a "civil action" against that party on the basis of the party's identity or status. Court of Appeals decisions interpreting these sections have uniformly held that a third-party defendant can remove under these statutes and in doing so remove the entire civil action, not merely the third-party claims. These decisions are from the Courts of Appeals for the First, Second, Third, Fifth, Eighth, and Tenth Circuits. *See, e.g.*, *Thompson v. Wheeler*, 898 F.2d 406, 409 (3d Cir. 1990) (applying 28 U.S.C. § 2679(c)); *Urbanizadora Villalba, Inc. v. Banco Y Angecia de Financiamiento de la Vivienda de Puerto Rico*, 845 F.2d 1 (1st Cir. 1988) (applying 12 U.S.C. § 1819); *Falls Riverway Realty v. City of Niagara Falls*, 732 F.2d 38 (2d Cir. 1984) (applying 28 U.S.C. § 1442(a)); *Johnson v. Showers*, 747 F.2d 1228, 1229 (8th Cir. 1984) (applying 28 U.S.C. § 1442(a)); *Goodrich v. Burlington Northern*

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6 In addition to finding that minimal diversity existed between the parties to the main claims, the Fifth Circuit also stated that, at the time SNECMA removed the case to the District Court, "there was actually *complete* diversity between the plaintiffs and defendants pursuant to 28 U.S.C. § 1332(c)." (App. 10) (Emphasis in original.) Petitioners nevertheless state in their Petition that "there is no independent federal jurisdiction over the main action" (Pet. 5) and that "the Fifth Circuit seems to have overlooked" that the "suit between original parties . . . has no independent basis for federal jurisdiction." (Pet. 16)

R.R. Co., 701 F.2d 129, 130 (10th Cir. 1983) (applying 28 U.S.C. § 1442(a)); *IMFC Professional Services of Florida, Inc. v. Latin American Home Health, Inc.*, 676 F.2d 152 (5th Cir. 1982) (applying 28 U.S.C. § 1442(a)). The decision below is in accord with the unanimous rule of these cases.

Further, the holdings in this case and the other cited cases that a third-party defendant's removal removes the entire case honor the longstanding Congressional preference that the entire civil action is removed and not just the claims against the removing party.[7] *See Barney v. Latham*, 103 U.S. 205, 209 (1881); *Texas Employers Ins. Ass'n v. Felt*, 150 F.2d 227, 234-35 (5th Cir. 1945). The instant case does not present an appropriate occasion to reconsider this well-established doctrine.

As for Petitioners' claim that the Fifth Circuit's decision in this case conflicts with a "similar decision of the Seventh Circuit", the only decision of the Seventh Circuit (or any other Circuit) even cited by Petitioners in Point I is *Thomas v. Shelton*, 740 F.2d 478 (7th Cir. 1984), which appears in a footnote (Pet. 7 n.3) and is not otherwise discussed. In *Shelton*, the Seventh Circuit addressed the issue of removal by a third-party defendant under 28 U.S.C. § 1441(c). 740 F.2d at 482. The court was not faced with, and did not address, the scope of removal under 28 U.S.C. § 1441(d).[8]

Petitioners' use of cases decided under § 1441(c) to suggest that the Fifth Circuit incorrectly interpreted § 1441(d) is not only misleading but is also illogical. These statutes have different language and different purposes; further, they have markedly different policies. The purpose of § 1441(c) was explained by the Seventh Circuit in *Shelton*:

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7 The only present exception to this rule concerns bankruptcy removals under 28 U.S.C. § 1452 (1988), which allows a party to remove "any claim or cause of action in a civil action." *See In re Princess Louise Corp.*, 77 B.R. 766, 769 (C.D. Cal. 1987).

8 It is perhaps telling that this so-called "similar" case was never even cited by Petitioners to either the District Court or the Court of Appeals.

> The apparent purpose of this provision and its predecessor, 28 U.S.C. § 71 (1940 ed.), was to prevent a plaintiff who sues a defendant in state court on a claim within the federal court's original jurisdiction from attempting to defeat the defendant's right of removal by joining a claim not within that jurisdiction.

740 F.2d at 482. Moreover, as is the case with removal under 28 U.S.C. § 1441(a) and § 1441(b), federal courts have narrowly construed this particular removal provision in order to demonstrate "due regard for the rightful independence of state governments." *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941).

On the other hand, § 1441(d) was enacted as part of the FSIA, and its purpose is to concentrate litigation involving foreign states in the federal courts in order to achieve uniform standards of decisional law. As this Court stated in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983), § 1441(d) was enacted because "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts . . . ."

In the case of § 1441(d), Congress created a distinct preference for removal by foreign states as compared to the right of other parties to remove under provisions like §§ 1441(a)-(c). As a result, federal courts have generally declined to apply to § 1441(d) the proposition that removal statutes should be strictly construed. *See, e.g., Proyecfin de Venezuela, S.A. v. Banco Industrial de Venezuela*, 760 F.2d 390, 396-397 (2d Cir. 1985) ("Congress's intent to create a broad removal right is further substantiated by reference to the legislative history of the [Foreign Sovereign Immunities] Act").

In summary, there is no conflict between this case and any decision of any other Circuit. Petitioners ultimately admit this fact in the first sentence of their Point II: "[N]one of the cases cited in Point I deal with the precise issue presented here . . . ." (Pet. 8)

II. There are no other special or important reasons for reviewing the judgment below.

In Points II and III of the Petition, Petitioners attempt in various ways to persuade the Court that there are significant issues here that warrant review. All of these arguments are without merit.

A. Petitioners' collusion argument is without merit.

Petitioners claim that Boeing's assertion of third-party claims against SNECMA was a "collusive ploy" (Pet. 14) to create jurisdiction in this matter. The Fifth Circuit correctly determined that this argument was "frivolous." (App. 20) This Court decided long ago that the assertion of a good-faith claim by a party with a real and substantial interest in that claim cannot be "collusive" for purposes of 28 U.S.C. § 1359 and its predecessor statutes. *In re Metropolitan Ry. Receivership*, 208 U.S. 90, 111 (1908); *Chicago v. Mills*, 204 U.S. 321, 330 (1907) (holding that a party's motive for preferring a federal tribunal is immaterial).[9]

Petitioners assert that SNECMA's waiver of jurisdictional immunity somehow indicates collusion between itself and Boeing regarding the removal of the action. (Pet. 6) SNECMA's waiver of immunity was not only irrelevant to the decisions below,[10] but Petitioners' arguments ignore the fact that SNECMA had good reason to waive any jurisdictional immunity it might have in this case. SNECMA determined that,

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9 Cases decided under the predecessors of 28 U.S.C. § 1359 have continuing validity in interpreting that section. *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 826 (1969).

10 SNECMA's waiver was filed the same day the District Court dismissed the actions and neither the District Court nor the Court of Appeals even referred to the waiver. Furthermore, the District Court's opinion cited a Fifth Circuit Case holding that if a case can be dismissed on *forum non conveniens* grounds the immunity issue need not be decided. *Nolan v. Boeing Co.*, 22 Avi. Cas. (CCH) 17,811, 17,812 n.1 (E.D. La. 1989), citing *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285 (5th Cir. 1989).

after carefully considering its alleged commercial activity in the United States and the time, effort, and expense that would result if it were to maintain its immunity defense, and after considering the likelihood of an early dismissal of this case in its entirety on the ground of *forum non conveniens*, it was in SNECMA's best interest to waive (in this case only) its immunity under the FSIA pursuant to 28 U.S.C. § 1605(a)(1) (1988). In so doing, SNECMA reserved to itself all other entitlements, rights, and privileges granted by the FSIA. In addition, SNECMA determined that, although it is in its interest to have this case litigated in the United Kingdom, it is also in its interest to have this case litigated in a federal forum if it is to be litigated in the United States. As the Court of Appeals correctly observed, "[t]he outcome of the main suit very much affects SNECMA's rights." (App. 15) In summary, Petitioners are not in a credible position to assess the interests of SNECMA in this case.

Petitioners' "collusion" claim was carefully considered and rejected by both lower courts. In any event, Petitioners' arguments present no issue of general significance that this Court should address.

B. Petitioners' *Finley* argument is without merit.

Petitioners argue in Point II of the Petition that the Court of Appeals' decision "directly conflicts" with this Court's recent decision in *Finley v. United States*, 490 U.S. 545 (1989), which held that a different statute, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) (1988), does not authorize supplemental jurisdiction over non-federal claims. (Pet. 10) This argument is legally incorrect and, in view of the substantial statutory changes made since *Finley*, does not present a significant issue for the Court.

First, as the Fifth Circuit carefully explained in its opinion, there is no conflict between its decision and *Finley*. Unlike the situation in *Finley*, when Congress enacted the FSIA it expressly provided in § 1441(d) for federal jurisdiction over the entire "civil action" in cases involving foreign states,

which necessarily includes claims involving other parties. *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1990); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980).

Second, notwithstanding Petitioners' frequently repeated contention that their claims are not within the District Court's original diversity jurisdiction, these cases were properly removed by SNECMA after the effective date of the legislation clarifying that the citizenship of the represented parties should be considered in determining if diversity exists. *See* 28 U.S.C. § 1332(c)(2) (as amended by Pub. L. 100-202, § 202(a), 102 Stat. 4642, 4646 (1988)). As a result, the Fifth Circuit held that Petitioners' claims against Boeing, GE, and CFMI, Inc. were within the District Court's original jurisdiction at the time of SNECMA's removal. (App. 10) The fact that the defendants were unsuccessful initially in removing these claims prior to the effective date of the amendment to § 1332(c) is irrelevant. Further, the statutory change gives this case a unique factual and procedural posture. The improbability of such a situation arising again is reason enough for this Court to deny the Petition.[11]

Third, and perhaps most importantly, *Finley* itself has been legislatively overruled, and future cases will necessarily present very different issues from this case. Section 310 of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5113-14 (codified as 28 U.S.C. § 1367), expressly provides for the sort of supplemental jurisdiction in

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11 Because of the quirk that the main claims were within the original jurisdiction of the federal court even though they could not be removed, they would have remained in federal court even if SNECMA had been dismissed. *See, e.g., In re Wilson Industries, Inc.*, 886 F.2d 93, 96 (5th Cir. 1989). Typically this will not be the case, and pendent state law claims will be subject to remand if the federal claims are dismissed. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988). *See* U.S.C. § 1367(c)(3) (as amended by Pub. L. 101-650, § 310, 104 Stat. 5089, 5113-14). This fact disposes of Petitioners' claim that, if the Fifth Circuit's decision is permitted to stand, foreign state defendants will be impleaded on the merest "pretense" (Pet. 8, 9) which "will result in an avalanche of parties seeking removal . . . ." (Pet. 8)

the federal courts that this Court found not to exist in *Finley* and which Petitioners contend does not exist under the FSIA. The new § 1367(a) provides, in relevant part:

> [I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

This new statute was Congress's response to this Court's comment in *Finley* that "[w]hatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress", 490 U.S. at 556, and eliminates for future cases the so-called conflict that the Petitioners allege exists in this action. As stated in the legislative history to this new statute, "[i]n providing for supplemental jurisdiction over claims involving the addition of parties, subsection (a) explicitly fills the statutory gap noted in *Finley v. United States*." H.R. Rep. No. 101-734, 101st Cong. 2d Sess. 29, *reprinted in* 1990 U.S. Code Cong. & Admin. News 6802, 6875. The statutory change after this case arose refutes Petitioners' claim that the Fifth Circuit's ruling has some broad applicability to future cases.

Petitioners nevertheless try to give a semblance of public significance to this case by arguing that the law under which it was decided is unaffected by § 1367. Their argument seems to be that § 1367 does not apply to FSIA jurisdiction and that a Congressional intent to narrow FSIA jurisdiction should be read into the fact that § 1441(d) was not itself amended. While questions as to the relationship of the 1990 legislation to the FSIA are obviously for another day, Petitioners' argument that § 1367 is irrelevant can be easily dismissed.

Petitioners state that § 1367 permits supplemental (also called "pendent party") jurisdiction "only in a case where a well-pled federal question is the primary basis of federal jurisdiction", apparently attempting to distinguish such cases from FSIA cases for which, they say, "pendent party jurisdiction of the federal court is not allowed." (Pet. 12) In fact, by its plain language, § 1367 applies to "any civil action of which the district courts have original jurisdiction." Under 28 U.S.C. § 1330(a), the district courts have "original jurisdiction of any nonjury civil action against a foreign state." FSIA cases are squarely within the class of cases to which the new legislation applies.

C. Petitioners' argument concerning the purpose of the FSIA is without merit.

In a further attempt to attract this Court's attention to this case, Petitioners have raised an issue that was not raised in the Fifth Circuit. Petitioners argue that "the sole purpose" for allowing a foreign state to remove under 28 U.S.C. § 1441(d) is to provide a federal forum for the adjudication of sovereign immunity. (Pet. 9-10, 13) This argument is without supporting authority and is frivolous. When Congress enacted the FSIA, it intended that *all* issues in cases involving a foreign state could be brought before a federal district court, not just the issue of sovereign immunity. This conclusion follows from the plain language of the statute. It is made more clear by the legislative history and is confirmed again by the case law. As this Court stated in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. at 489, "the Act guarantees foreign states the right to remove *any* civil action from a state court to a federal court." (Emphasis supplied.)

The legislative history to the FSIA specifically states that "broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences" and that "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in

this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 13, 32, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6611, 6631. An even clearer statement of the legislative purpose is contained in the report of the American Bar Association Section of International Law to the House of Delegates recommending passage of the FSIA:

> The bill will ensure that the federal courts have subject matter and personal jurisdiction over foreign states that are not entitled to immunity for claims against them by American citizens. . . . [F]rom the perspective of the foreign states, the removal provision in the bill will allow them to seek in the federal courts what they may regard as greater impartiality and uniformity of decision.

1976 A.B.A. Int'l L. Rep. 101B at 10. *See Arango v. Guzman Travel Advisors Corp.*, 621 F.2d at 1376-77 n.6 ("the federal hearing is not restricted to [the sovereign immunity] issue but must proceed to the merits when the foreign state is found not to be immune.")[12] Petitioner's accusations that "SNECMA clearly did not invoke the federal court jurisdiction in good faith since it waived its claim of immunity immediately after removal" (Pet. 4) and that SNECMA "did not honestly seek the federal court for the determination of its immunity" (Pet. 6) misconceive the scope of SNECMA's right under the FSIA to litigate all issues in federal court.

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12 A survey of the case law illustrates that foreign states often remove without even making a claim of immunity. For example, a foreign state which has engaged in commercial activity in the United States may remove a civil action originally commenced in state court simply to extinguish a plaintiff's demand for a jury trial. *See, e.g., Williams v. Shipping Corp. of India*, 653 F.2d 875 (4th Cir. 1981), *cert. denied*, 455 U.S. 982 (1982); *Mori v. Port Auth. of New York and New Jersey*, 100 F.R.D. 810 (S.D.N.Y. 1984); *Herman v. El Al Israel Airlines, Ltd.*, 502 F.Supp. 277 (S.D.N.Y. 1980).

D. Petitioners' "comity" and "federalism" arguments are without merit.

There are no significant comity and federalism issues present in this case that warrant this Court's attention. SNECMA's removal of these actions pursuant to the FSIA rests upon strong federal interests, namely relations with foreign governments. Moreover, because this case has no connection whatsoever with Louisiana, there are no significant state interests which might take precedence over these federal interests.

This case arises out of an aircraft accident that occurred on a domestic flight in a foreign country. The claimants are virtually all citizens or residents of the United Kingdom; none of them are residents of Louisiana or even of the United States. Furthermore, none of the Respondents are incorporated in, or have their principal place of business in, Louisiana, and none of Petitioners' claims against Respondents arise out of any acts or omissions that occurred in or had any impact in Louisiana. There is simply no plausible, much less compelling, policy of comity or federalism that dictates that a Louisiana state court should decide this case.

CONCLUSION

The decision of the Fifth Circuit is not in conflict with any decision of this Court or of any other Court of Appeals. Furthermore, the decision of the Fifth Circuit does not raise any important issues regarding the Foreign Sovereign Immunities Act of 1976, this Court's *Finley* decision, the existence of supplemental jurisdiction, or the relationship between the state and federal courts. Finally, the Fifth Circuit correctly decided the scope of removal under 28 U.S.C. § 1441(d) and correctly concluded that each removed civil action was within its jurisdiction. Therefore, the Petition for a Writ of Certiorari should be, in all respects, denied.

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